United States Court of Appeals

for the Second Circuit

APPENDIX

76-2064

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA, ex rel :
JOSEPH A. MERCOGLIANO

Petitioner-Appellant :

-against- :

COUNTY COURT OF NASSAU COUNTY :

Respondent-Appellee :

- -x

B
P/s

DOCKET NO. 76-2064

APPENDIX FOR PETITIONER-APPELLANT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA ex rel
JOSEPH A. MERCOGLIANO,

Petitioner,

-against-

COUNTY COURT OF NASSAU COUNTY,

Respondent.

- -x

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OPINION AND ORDER

June 7 , 1976

PLATT, D.J.

PRELIMINARY STATEMENT

New York's second felony offender statute (Penal Law § 70.06) provides that indeterminate sentences of specified maximum and minimum lengths must be imposed on offenders convicted of a felony for the second time. Until the statute was amended in 1975, the earlier "felony conviction" was defined to be a conviction in New York of a felony,[1] or a conviction in another jurisdiction of an offense for which a sentence of imprisonment of more than one year (or a sentence of death) was authorized,[2] provided that such earlier conviction, whether in New York or elsewhere, took place within the ten years prior to the second offense.

1. See Penal Law § 10.00(5), which defines "felony" as an offense for which imprisonment in excess of one year can be imposed.

2. The 1975 amendment of § 70.06 added to this latter provision the requirement that a one-year sentence also be possible in New York for that offense.

Petitioner in this action was convicted on January 21, 1975, of Criminal Possession of a Controlled Substance in the Sixth Degree, a felony, upon a plea of guilty to the charge in the County Court of Nassau County. He was sentenced as a second felony offender to an indeterminate term of 1-1/2 to 3 years, the shortest term possible under Penal Law § 70.06(3)(d) and (4). The predicate felony conviction was a 1972 Texas conviction for possession of marijuana, for which petitioner could have been sentenced under Texas law to a term of more than one year.[3] Had petitioner been convicted in New York for possession of the same amount of marijuana, he would not be a second felony offender, for New York then did not, and does not now, provide that such possession constitutes a felony.

Petitioner's argument in his petition for a writ of habeas corpus is that New York has denied him the equal protection of the laws by requiring that he be sentenced as a second felony offender. Another defendant, identical in every way with him except convicted in New York instead of in Texas of the earlier possession offense, would, petitioner suggests, be eligible for more lenient treatment. To consider possession a felony in his case simply because it did not occur in New York is, he claims, arbitrary and irrational.

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3. Texas has since amended its law, and possession of the relevant amount of marijuana could no longer lead to that long a prison term.

Thus the question for this Court is: was it a denial of equal protection for the State of New York to provide that felony offenders who had earlier been convicted in another jurisdiction for an offense for which more than one year's imprisonment could have been imposed by that jurisdiction should be treated more severely than felony offenders with a past conviction was for the same offense, but in New York, the offense being such that New York courts could not impose a one-year sentence.[4]

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4. We note preliminarily that a three-judge court is not required for the resolution of this question.

It seems well established that the three-judge court provision of 28 U.S.C. § 2281 does not apply to habeas corpus proceedings, at least if no attempt is made to initiate the proceedings on behalf of a class. See e.g. Wilson v. Gooding, 431 F.2d 855 (5th Cir. 1970), aff'd, 405 U.S. 518 (1972); Scott v. District Attorney, Jefferson Parish, State of Louisiana, 309 F.Supp. 833 (E.D.La. 1970), aff'd, 437 F.2d 500 (5th Cir. 1971); United States ex rel. Laino v. Warden of Wallkill Prison, 246 F.Supp. 72, 92 n.16 (S.D.N.Y. 1965), aff'd, 355 F.2d 208 (2d Cir. 1966). We therefore need not consider other aspects of the three-judge court question.

DISCUSSION

I

Both parties appear to agree that this Court can declare that the second-felony provisions in effect in New York at the time of petitioner's plea of guilty deny equal protection only if they are arbitrary and unreasonable, and are not relevant to the object of the legislation. See Marshall v. United States, 414 U.S. 417, 422 (1974); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Both sides also appear to agree that the legislative purpose of § 76.06 is to punish hardened criminals more severely than persons who have not committed felonies in the past. Neither side argues with the rationale for the statute; petitioner simply maintains that the test for determining which are the criminals more deserving of punishment is, in relevant part, irrational.

The respondent, the County Court for the County of Nassau, argues that the test is rational. Respondent suggests that the test provides a simple and uniform criterion for determining which are the serious offenders, i.e., serious offenders are those who are twice convicted of offenses for which a serious penalty can be imposed by whatever jurisdiction has seen its laws broken. The statute was based on the recommendations of the Model Penal Code, the American Bar Association's Minimum Standards for Sentencing, and the New York State Commission on the Revision of the Penal Law.

Respondent further argues that the Supreme Court has declared that the most objective criterion to determine the seriousness of an offense is the length of sentence, see Baldwin v. New York, 399 U.S. 66 (1970) (plurality opinion); Duncan v. Louisiana, 391 U.S. 145 (1968), and that it follows that the use of length of sentence in the test must be considered rational.

Of course, it is also crucial that the respondent demonstrate that it is rational for the test to provide that the length of sentence where the offense takes place, rather than the length of sentence that would be applied in New York, should control. To illustrate with the facts before us, respondent's argument must be that it is rational to conclude that because Texas imposes harsher punishment on those who possess marijuana, those who possess marijuana in Texas are more serious offenders than those who possess marijuana in New York.

We agree with respondent that this is a rational position for a legislature to take. We cannot say that it is irrational to consider that a Texas offender is a more serious offender, for the simple reason that he was told that Texas considers that his crime is serious, but he nevertheless committed that crime against the State of Texas. The Texas offender has in effect demonstrated that he is not concerned about behaving in accordance with the norms important to the society in which he is present, and that factor sets him apart from the possessor of marijuana in New York who has demonstrated no comparable lack of concern. This distinction

is sufficient under the Equal Protection Clause of the Fourteenth Amendment to justify disparate treatment in sentencing.

We note that this is hardly the only context in which deference may be paid to the standards of the community in which questionable activity takes place. In obscenity cases, for example, community standards determine what is, and what is not, protected under the First Amendment, see Miller v. California, 413 U.S. 15 (1973). Under the federal criminal statute which forbids use of the mails for shipment of obscene materials (18 U.S.C. § 1461), behavior can be judged under community standards, see Hamling v. United States, 418 U.S. 87 (1974), rather than under a uniform national standard. Just a few months ago the Court of Appeals for the Third Circuit upheld the use of state law to determine whether aliens have committed "adultery" for the purposes of 8 U.S.C. § 1101(f), Brea-Garcia v. Immigration and Naturalization Service, _____F.2d_____, 44 USLW 2414 (3d Cir. Feb. 25, 1976). Under the two federal statutes named, and also under 18 U.S.C. § 4251(f) (see discussion below), certain actions in one state may give rise to the imposition of penalties by another sovereign, the United States, even though such penalties would not be imposed for identical actions in another state. In these areas, and in the case at bar, it is rational to measure conduct with a yardstick supplied by the society in which the conduct occurs.

II

Petitioner strives to overcome the presumption of legislative rationality, first with what amounts to an argument that other jurisdictions may be arbitrary or unreasonable in determining what penalties they impose for offenses, and second by suggesting that other courts have held that § 70.06 and similar provisions are unreasonable.

Petitioner's first point is that those who have joined an interracial political party in the Republic of South Africa, those who have committed fornication in Alabama, and those who have stolen a turkey in Arkansas are susceptible to the harsher penalties of § 70.06, because those jurisdictions provide that the listed offenses are punishable by more than one year in prison. He tells us that increased punishment for such past offenders, or for those who have possessed two marijuana cigarettes in Texas, cannot promote the ends of § 70.06, which ends are that more serious offenders be more severely punished.

We note first that we pass the question, since it is not before us, of whether New York could more seriously punish past offenders against the type of statute in force in South Africa. Such statutes are obviously repugnant to the United States Constitution, and stand in a much different position from statutes which we might simply consider unwise. Indeed, New York provides for challenges to the consideration of past convictions under such statutes, N.Y.C.P.L. § 400.21(7)(b)

Second, we do not agree, as we have indicated above, that it is irrational for a legislature to punish more severely those who indicate that they are willing to ignore the norms of the society in which they find themselves. No matter how ridiculous a rational legislator might think it is for a legislature in another jurisdiction to deem certain offenses serious, he might nevertheless believe it important that the law be obeyed by those within that legislature's jurisdiction, and consider it serious when the law is not obeyed. Surely the fact that plaintiff might have thought that the drug laws of Texas were ridiculously severe gave him no right to second-guess the Texas legislature as to the importance of their object, no license to act as if the law did not apply to him. Just as surely, the New York legislature must be free to consider his transgression against his social duty to be evidence that he is more deserving of punishment than one who has not so violated laws of importance to the people of the jurisdictions in which he has resided.

Several of the authorities advanced by petitioner in support of his argument merit individual attention.

United States v. Bishop, 469 F.2d 1337 (1st Cir. 1972), dealt with 18 U.S.C. § 4251(f)(4), a provision of the federal Narcotic Addict Rehabilitation Act, P.L. 89-793, 80 Stat. 1438 (1966), which excludes from treatment under the Act all offenders with two prior felony convictions. A "felony" conviction under this Act is any conviction for an offense classified as a felony by the United States in 18 U.S.C. § 1, as well as any conviction for an offense labelled

a felony by the jurisdiction in which it was committed.

The First Circuit Court of Appeals ruled that this two-felony disqualification was unconstitutional. And it is true that part of the Court's reasoning was that it is improper to treat differently those who commit the same crime, but in different states, as the Act provides in situations where the different states attach different labels to the crime, 469 F.2d at p. 1345. However, this factor was only one of many "anomalies" listed by the Court as justification for invalidating § 4251(f)(4) of the statute; most of the Bishop opinion discusses inconsistencies between that section and the Act's other provisions.

Further, whatever persuasiveness the Bishop opinion might once have had has been undercut, to say the least, by Marshall v. United States, 414 U.S. 417 (1974). That opinion upheld the two-felony disqualification, and effectively overruled Bishop, in the face of an equal protection challenge.

Indeed, the Marshall opinion could very well be deemed a general statement by the Supreme Court that legislative classifications may be considered rational even though they treat differently two defendants who commit the same offense in different states -- as does the New York statute under consideration here -- and that such classifications therefore can withstand equal protection attacks.

Petitioner responds with the argument that the provision approved in Marshall was the provision utilizing the State felony label to decide which were serious offenses; that is a provision different from New York's § 70.06, he claims, since § 70.06 instead utilizes the length of sentence to determine how serious an offense is. But, as indicated, we have been told by the Supreme Court that length of sentence is the most reasonable indicator of seriousness. Marshall held that it is reasonable to determine which criminals receive traditional prison sentences, rather than narcotics addiction treatment, by seeing which criminals have two "felony" convictions; it seems more reasonable to determine which receive mandatory minimum sentences, rather than sentences without such minimums, by seeing which criminals have prior convictions for which they could have received one year in prison. At any rate, attempts by petitioner to distinguish Marshall from this case serve as well to distinguish his Bishop precedent.

Petitioner also cites People v. Morton, 48 A.D.2d 58 (3d Dept. 1975), and People v. Mazzie, 78 Misc. 2d 1014 (Sup.Ct. N.Y.Co. 1974). Those cases do hold that Penal Law § 70.06 is unconstitutional if applied so that prior crimes from other jurisdictions are considered for which crimes New York State would impose less than one year in prison. We have read these opinions, but find them less persuasive

than People v. Wixson, 79 Misc. 2d 557 (Sup.Ct. Westcheste 1974), which holds, as did the Second Department in this c that § 70.06 does not deny equal protection to those in petitioner's position. See also People v. Blount, 82 Misc 964 (Co.Ct. Nassau Co. 1975); People v. Sibila, 8 Misc. 2 1028 (Co.Ct. Nassau Co. 1975).

We repeat, by way of final word, that New York h seen fit, perhaps because of hostile decisions like People Mazzie, to amend § 70.06 of its Penal Law so as to elimina for the future the problems which were presented in this c We of course take no position on the wisdom of this course We merely state that the Equal Protection Clause of the Fourteenth Amendment did not mandate it.

III

It follows from the foregoing that the petition Mr. Mercogliano must be and hereby is dismissed. We hold that § 70.06, as it read and as it was applied at petitio sentencing, did not impose upon him any unreasonable clas cations and therefore did not violate his rights under th Equal Protection Clause of the Fourteenth Amendment. Thi conclusion makes it unnecessary for us to consider respon other arguments.

SO ORDERED.

Thom C. Platt

U.S.D.

COUNTY COURT : NASSAU COUNTY
PART XII

Ind# 4V589

- x

THE PEOPLE OF THE STATE OF NEW YORK :

-against- : Ind. #40929

JOSEPH A. MERCOGLIANO, :

Defendant.:

- x

Mineola, New York
January 21, 1975

B e f o r e :

HON. ALFRED F. SAMENGA, County Court Judge.

A p p e a r a n c e s :

PHILIP GRELLA, ESQ., Assistant District Attorney,
for the People.

GROVER M. MOSCOWITZ, ESQ., for the Defendant.

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MINUTES OF CHANGE OF PLEA

- - -

THE CLERK: People versus Joseph A. Mercogliano.

You are Joseph A. Mercogliano?

THE DEFENDANT: Yes.

THE COURT: Bring the father up.

MR. MOSCOWITZ: Yes, your Honor.

THE CLERK: You were indicted as Joe Mercogliano, is

that correct?

THE DEFENDANT: Yes.

THE CLERK: You appear here under Indictment Number 40929 with Grover M. Moscowitz as counsel, is that correct?

THE DEFENDANT: Yes, sir.

THE CLERK: Do the People have an application?

MR. GRELLA: Yes, your Honor. After a number of discussions before your Honor and with defendant's attorney, at this time, the People recommend to the Court that the defendant be allowed to plead guilty to the Class E felony of attempted criminal sale of a controlled substance in the sixth degree in satisfaction of Indictment Number 40929. The People have made no promises, commitments or threats to induce this plea nor have we made any promises or commitments with regard to your Honor's sentence.

THE COURT: All right. Counsel, you heard the statement made on the record by the representative of the People. Does that constitute the disposition that you and he have discussed with reference to your client?

MR. MOSCOWITZ: That is correct, your Honor, and I join in the application of the District Attorney.

THE COURT: Does the defendant accept the proposed disposition for the purposes of a plea?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, you Joseph, raise your right hand. Do you solemnly swear the testimony you will give in this case to be the truth, the whole truth, and nothing but the truth, so help you God?

THE DEFENDANT: Yes, sir.

THE COURT: Give your name and address to the Reporter.

THE DEFENDANT: Joseph A. Mercogliano, Grossinger's Hotel, Grossinger, New York.

THE COURT: Now, Joseph, I am going to be asking you a number of questions and you are required to answer. In the event you do not understand the questions, please let me know. If you have, at any time, any question in your mind that you would like to discuss with your attorney before you answer any question I pose, you are free to do so. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Or if I ask you a question and you want to consult with your lawyer, you may do so. Now, standing next to you to your left, in addition to your attorney, is someone whom I have been advised is your father. Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And you do not reside at home with your parents?

THE DEFENDANT: No, sir.

THE COURT: What's the occasion of your residing where you presently reside?

THE DEFENDANT: Well, I was working this summer as a camp counsellor upstate and I really liked it up there so I tried to find a job and I found a job in the hotel, at Grossinger's, and I am working in the service bar learning to be a bartender.

THE COURT: You are the boy's father?

DEFENDANT'S FATHER: Yes, sir.

THE COURT: All right. I would like you to pay attention to the entire proceedings so you would be aware of it as well. Your son is charged with a number of violations of the law. In this instance, three counts involving the sale and possession and possession with the intent to sell a controlled substance known as marijuana.

Joseph, are you the same Joseph Mercogliano who is charged in Indictment Number 40929 with the possession and sale of marijuana on or about March 29th, 1974?

THE DEFENDANT: Yes, sir.

THE COURT: Now, you heard your attorney indicate to the Court that you wish to enter a plea of guilty to what is known as attempted criminal sale of a controlled substance in the sixth degree which is identified under the law as a

Class E felony in satisfaction of the three counts of this indictment. Did you hear him say that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you understand that among the counts of this indictment is one criminal sale of a controlled substance in the fifth degree which is, in fact, a Class C felony, do you know that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Now, under the law, felonies carry certain penalties. And the penalty depends upon the classification of the felony. A Class A felony carries with it the highest punishment. A Class B less than Class A. A Class C less than Class B. A Class D, less than Class C and Class E less than Class D. A Class E is the lowest felony and carries with it the least punishment. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you understand that if you go to trial, you may be exonerated by a jury of any of these charges, is that clear to you?

THE DEFENDANT: Yes, sir.

THE COURT: And, of course, by the same token, you may be found guilty by a jury of having committed the felony characterized as a Class C felony, is that clear to you also?

THE DEFENDANT: Yes, sir.

THE COURT: And do you understand that the penalty for a Class C felony is greater or are greater than the penalties for a Class E felony?

THE DEFENDANT: Yes, sir.

THE COURT: And is that one of the reasons why you would like to plead out to a Class E felony today, to avoid the risk of possible conviction of a Class C felony with its attendant larger penal sanctions?

THE DEFENDANT: Yes, sir.

THE COURT: And are you also desirous of bringing this matter to a close today?

THE DEFENDANT: Yes, sir.

THE COURT: How old are you?

THE DEFENDANT: Twenty-one, sir.

THE COURT: Single or married?

THE DEFENDANT: Single.

THE COURT: You told me already your occupation, that you are working upstate, New York. Are you presently under the influence of drugs or alcohol?

THE DEFENDANT: No, sir.

THE COURT: Do you know of any physical or mental illness which prevents you from understanding the proceedings today?

THE DEFENDANT: No, sir.

THE COURT: Are there any questions that you want to ask me concerning what I have said to you?

THE DEFENDANT: No, sir.

THE COURT: Do you want to consult with your attorney, at this time, about anything I have said to you?

THE DEFENDANT: No, sir.

THE COURT: Now, have you discussed with your attorney your legal and constitutional rights with reference to the charges that bring you into this Court today?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you understand that if I permit you to plead guilty to a Class E felony in satisfaction of the counts of this indictment, that you are waiving the right to a trial by jury?

THE DEFENDANT: Yes, sir.

THE COURT: That you are waiving the right to a trial without a jury?

THE DEFENDANT: Yes, sir.

THE COURT: You are waiving what is known as any pre-trial hearings. The law provides under certain circumstances, pre-trial hearings to determine whether or not you are the person who was involved in the incidents alleged, whether or not you were properly advised as to your constitutional

rights of counsel and remaining silent, whether or not the particular substance that was taken from you is in fact, a controlled substance, whether or not it was marijuana, and assuming that you have a prior record, whether or not any parts of your prior record can be utilized or should be utilized on cross examination if you take the stand. Do you understand that you are waiving those rights?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you also understand that if you enter a plea of guilty to a Class E felony, you are saying to me, "Judge, I am guilty of a Class E felony", do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: That's the same as being found guilty after trial of a Class E felony. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand also that it is the People who have the obligation of proving your guilt beyond a reasonable doubt and if you enter such a plea, you are removing that burden from them, is that clear?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you also understand that if you enter a plea of guilty to a Class E felony in this instance you are waiving your right of self-incrimination, the law

says you have no obligation to admit that you are the guilty person or that you committed a crime, the obligation is on the People, and if you enter such a plea, that you intend to do then you are waiving your right of self-incrimination because you are, in fact, incriminating yourself to the degree of the plea that you intend to enter, do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: Are you satisfied with the manner in which your attorney has handled this matter?

THE DEFENDANT: Yes, sir.

THE COURT: And have you discussed with your attorney as well as with your father who is present with you today, your intention of entering a plea of guilty to a Class E felony in satisfaction of the counts of this indictment?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And after that discussion, is that what you intend to do?

THE DEFENDANT: Yes, sir.

THE COURT: Now, your attorney in speaking to me, indicated that you had some prior record and related also an incident in the State of Texas, I believe, is that right, counsel?

MR. MOSCOWITZ: Correct, yes.

THE COURT: And as of this moment, we are not aware of whether that particular offense constitutes a felony in the State of Texas or a misdemeanor or anything else. Now, under the law of the State of New York, if that conviction in Texas constitutes a conviction of a felony, you would be considered in the State of New York to be a prior felony offender in that the conviction took place less than 10 years from the plea that we are taking today. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And under the law of the State of New York, if that is so, then the law says to the Judge, "You have no discretion. The man must be sentenced under the classification to which he entered this plea." So that if you are, in fact, a prior felony offender upon your plea today to a Class E felony, this Court would be compelled to fix a minimum jail term. Is that clear to you?

THE DEFENDANT: Yes, sir.

THE COURT: Now, since your attorney and I are not aware, and no one else apparently has been able to supply the information, concerning the status of that conviction in Texas, I said to your attorney that if I accept the plea today from you and if it develops that the Texas conviction is for a felony so that I would be mandated to fix a minimum

penal sanction, a minimal sentence in a correction facility, I would give you an opportunity through your attorney to withdraw the guilty plea here today. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And I would reinstate the not guilty plea and then we set it down for trial. Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: I also said that in the event that I entertain your plea today and I accept it and it develops that the Texas conviction is not for a felony so that you are not a prior felony offender, that I would then fix sentence dependent upon the recommendations made by the Probation Department. Is that clear to you?

THE DEFENDANT: Yes, sir, it is.

THE COURT: And I want you to understand, of course, that under a plea to a Class E felony, this Court does have the right to send you away for a period of up to three years, probation up to five years, or any combination thereof, is that clear to you?

THE DEFENDANT: Yes, sir.

THE COURT: And I intend to consider the recommendations made by the Probation Department. All right?

THE DEFENDANT: Yes, sir.

THE COURT: Now, is there anything about what I have said

to you that you would like to discuss with your attorney?

THE DEFENDANT: No, sir.

THE COURT: Did you understand everything I have said to you?

THE DEFENDANT: Yes, sir.

THE COURT: Now, Mr. Mercogliano, I am talking to the boy's father now, you heard everything I have said so far?

DEFENDANT'S FATHER: Yes, sir.

THE COURT: You have it pretty clear in your mind as to what the story is?

DEFENDANT'S FATHER: Yes, sir.

THE COURT: So, except for the promise that if the record shows a prior felony conviction, that I would permit you to withdraw the plea, there have been no promises or commitments or threats made, is that correct?

THE DEFENDANT: Right.

THE COURT: And is it your desire, willingly, of your own free will, to plead guilty to a Class E felony in satisfaction of the counts of this indictment?

THE DEFENDANT: Yes, it is.

THE COURT: All right. The Court is satisfied that the defendant understands the nature of the plea, the consequences of his plea, the possible penal sanctions that are involved, the Court is satisfied that the defendant understands he is

waiving certain legal and constitutional rights as spread forth on the record and the Court is further satisfied that the defendant's intention to enter a plea is voluntary, of his own free will, and that there have been no threats, commitments or promises other than spread on the record.

Now, for the purpose of my next question, I want you to understand that if I permit you to withdraw your plea at the time of sentence because you have a prior felony conviction, anything you tell me concerning the answer to the question may not be used against you in any future proceedings. I want you to tell me about your possession and sale of marijuana on March 29th, 1974, to the undercover agent. Tell me what happened?

THE DEFENDANT: Well, what happened was my friend, I have a friend who had so much of this marijuana, whatever it was--

THE COURT: Well, was it marijuana?

THE DEFENDANT: No, it wasn't, it was hash oil.

THE COURT: Hash oil?

THE DEFENDANT: Yes, sir. So, I didn't buy it, I didn't have it. He asked me to sell some for him, so I sold it for him, and I guess I sold to an undercover man.

THE COURT: What did you sell to the undercover man?

THE DEFENDANT: I sold him, I think, a gram or 2 grams.

No, 1 gram.

THE COURT: Now, did you know that it was the controlled substance marijuana?

THE DEFENDANT: Yes, I did.

THE COURT: All right. Did you know it was illegal to possess that controlled substance?

THE DEFENDANT: Yes, sir.

THE COURT: Did you know, also, that it was illegal to sell it?

THE DEFENDANT: Yes, I did.

THE COURT: But despite the fact that you knew it was illegal to possess and illegal to sell, you did, in fact, possess it and sell it?

THE DEFENDANT: Yes, sir.

THE COURT: On March 29th, 1974, is that right?

THE DEFENDANT: Yes, I did.

THE COURT: In Nassau County?

THE DEFENDANT: Yes, sir.

THE COURT: All right. The Court finds from having reviewed the background of this defendant, his age, his present employment record and considering his prior record that the interests of justice would bestbe served by permitting the defendant to plead guilty to a Class E felony in satisfaction of the counts of this indictment expediting

the disposition of this matter. And, acco
of the Court is directed to take the plea.

THE CLERK: Joseph A. Mercogliano, do y
withdraw your previously entered plea of not
under Indictment Number 40929 and plead guil
criminal sale of a controlled substance in th
a Class E felony, in satisfaction of this ind

THE DEFENDANT: No, I don't.

MR. MOSCOWITZ: Yes, you do.

THE DEFENDANT: Yes, I do.

THE COURT: Wait a minute. Let's get it st
any confusion. Please repeat what you just said
attention.

THE CLERK: Do you, at this time, withdraw yo
entered plea of not guilty to this indictment and
guilty to attempted criminal sale of a controlled
in the sixth degree, a Class E felony, in satisfac
this indictment?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand the question?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

THE CLERK: Do you, at the same time, withdraw any motions presently before this Court?

THE DEFENDANT: No.

THE COURT: All right. Now, the motions that he is referring to are those pre-trial hearings that I mentioned before. And since you are pleading guilty to a Class E felony in satisfaction of all the counts of this indictment, then should there be any outstanding motions they are withdrawn. I can't dispose of a case and have a motion pending. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: So with that understanding in mind, do you withdraw any motions for hearings?

THE DEFENDANT: Yes, sir.

THE COURT: All right.

THE CLERK: Your Honor, would you care to set pre-sentence investigation for February 28th, 1975?

THE COURT: How is February 28th, counsel?

MR. MOSCOWITZ: That is fine, your Honor.

THE COURT: All right. So ordered. Prior custody continued.

THE CLERK: Counsel, take your client over to 310 Old Country Road to the Probation Department now.

And, Joseph, the Court continues you in your own custody and advises you if you fail to appear at any time so directed by this Court, you will be charged with another

crime. Do you understand that?

THE DEFENDANT: Yes, sir.

THE CLERK: All right.

MR. MOSCOWITZ: Thank you, your Honor.

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CERTIFIED AS A COMPLETE
AND ACCURATE TRANSCRIPT.

Edward Arianas

Edward Arianas, C.S.R.

COUNTY COURT : NASSAU COUNTY

PART XII

- x

THE PEOPLE OF THE STATE OF NEW YORK

- against - Ind. #40929

JOSEPH A. MERCOGLIANO,

Defendant.

- x

Mineola, New York
April 4, 1975

B e f o r e:

HON. ALFRED F. SAMENGA,
County Court Judge

Appearances:

HARVEY MELNIKER, ESQ.,
Assistant District Attorney,
for the People

GROVER MOSCOWITZ, ESQ.,
for the Defendant

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MINUTES OF SENTENCE

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JAMES F. GILL, C.S.R.
Official Court Reporter

THE CLERK: People versus Joseph A. Mercogliano, Indictment No. 40929. You are Joseph A. Mercogliano?

THE DEFENDANT: Yes.

THE CLERK: You appear here with your attorney Mr. Grover Moscowitz under Indictment No. 40929, is that correct?

THE DEFENDANT: Yes.

THE CLERK: For sentence?

THE DEFENDANT: Yes.

THE COURT: The boy's father is here, is that right, counsel?

MR. MOSCOWITZ: Yes.

THE COURT: Why don't you let him stand next to us. Mr. Melniker, do you have the assertion of prior felony?

MR. MELNIKER: Your Honor, I do not have my files with me. Would you look through the folder and see if you have the certification or the allegation by the People of the defendant having been convicted of a prior felony in the Chambers County Court of Texas. I have a notation that it was filed on February 28th, 1975.

THE CLERK: Yes, sir.

THE COURT: May I have it please? Do you have an extra copy of that in the file?

THE CLERK: That is the only one, your Honor.

THE COURT: Would you show this to counsel for th defendant. I don't know whether or not you received of those, counsel, but I would like you to take a loo it.

MR. MOSCOWITZ: I did receive one.

THE COURT: All right. Fine. You may proceed.

THE CLERK: The District Attorney of the County of Nassau has filed an information against you accusing you of certain prior felonies or convictions in that on or about the 7th day of September, 1972 in the County Chambe of the State of Texas the said defendant was duly by law convicted upon his plea of guilty to the crime and felony of unlawful possession of marijuana and a judgment entered thereon.

It is dated February 4, 1975 , by Dennis Dillon, the District Attorney of Nassau County.

You may contravert these allegations either as untrue or on the ground that the previous conviction or convictions were obtained in violation of your rights under the constitution of the United States.

Do you wish to contravert any of the allegations contained in this statement?

THE COURT: I want you to understand something at this point. If you contend that the conviction in Texas was

not a felony conviction, it's important for you to raise that question now.

Because if you do not challenge the constitutionality of that conviction as a felony in the State of Texas, your attorney has undoubtedly advised you and as I discussed with your attorney and with your father, the law mandates that I prescribe and fix a certain sentence in a correctional facility. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now under the law you have a right to challenge the constitutionality along the lines that you were never advised as to your rights or that the proceeding in Texas itself was illegal.

And unless you do challenge it and acknowledge that that is so, the presumption is that the declaration file is a correct one. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now I must ask you at this time whether you acknowledge that you are the same person who in fact was convicted of a felony in Chambers County, State of Texas, on or about September 7th, 1972, upon the plea of guilty to the felony possession of marijuana?

THE DEFENDANT: Yes.

THE COURT: All right. Now do the People have any

position on sentence?

MR. MELNIKER: The People take no position with respect to sentence, your Honor.

THE COURT: Counsel?

MR. MOSCOWITZ: If your Honor please, it is a predicate felony as far as Texas is concerned in the State of New York. Except that I want to point out to the Court that the charge against him in Texas, if he were arrested today and charged today would be a misdemeanor.

The law of Texas has been changed. He was convicted according to the statement that the defendant told me the equivalent of two marijuana cigarettes in Texas.

But it made it a felony in Texas, and here we are now under the predicate felony law in New York State.

And I ask you, I know the Penal Law and I know what you would have to do, of course, under that law. But I would like you to show as much leniency as possible.

THE CLERK: Does the defendant wish to be heard regarding sentence?

THE DEFENDANT: No.

THE CLERK: Give your attention to the Court.

THE COURT: Do you want to say anything to me, Joseph?

THE DEFENDANT: No.

THE COURT: Joseph, I spoke to your attorney and I also

spoke to your father. I reviewed all the facts and circumstances of the probation report.

And I also reflected with your attorney as well as with your father the mandates of the law where there is acknowledgement of a prior felony offense within ten years of the matter that brings you before this Court.

And while the law mandates that I must impose a sentence, it gives me discretion as to the nature of the sentence to impose, whether to give you a maximum sentence or anything less than a maximum sentence.

Having heard your attorney set forth the information that at the present time the same offense in the State of Texas is no longer considered a felony, in the discretion that rests with this Court, it is hereby ordered and adjudged by this Court that for the crime of attempted criminal sale of a controlled substance in the sixth degree, a Class E felony, for which you stand convicted on your plea of guilty under Indictment No. 40292 and in satisfaction of said indictment, that you, Joseph A. Mercogliano, are hereby sentenced as a second felony offender to an indeterminate term of imprisonment of not less than 18 months and not to exceed three years and that you be committed to the custody of the New York State Department of Correctional Facilities at Stormville, New

York, for imprisonment for the said sentence and until released according to the law. Advise him as to his Appellate rights.

THE CLERK: Joseph A. Mercogliano, you are advised that you have the right to appeal from this sentence and these proceedings. If you wish to appeal, you must file your notice of appeal with the Clerk of this Court within 30 days.

If you cannot afford a lawyer or the minutes of these proceedings, you may make application to the Appellate Division which will, upon being satisfied that you cannot afford the same, order that an attorney be appointed and the minutes provided without any charge to you.

Your lawyer is directed by the Court to advise you in full and to take necessary steps indicated by you in this regard.

Do you understand that?

THE DEFENDANT: Yes.

MR. MOSCOWITZ: Thank you.

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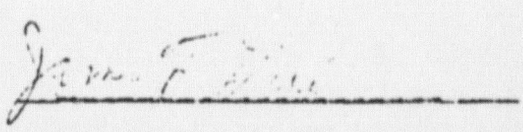
Certified to be a correct transcript of my stenographic minutes.



MEMORANDUM

IN SUPPORT

AN ACT to amend the Penal Law, in relation to the definition of a second felony offender

SUMMARY OF PROVISIONS

Present law defines a second felony offender as one convicted of a felony defined in the penal law after having been subjected to one or more predicate felony convictions. The predicate conviction must have been in this state of a felony, or in any other jurisdiction of an offense for which the defendant could have been sentenced to prison for more than one year or to death. The bill would redefine predicate felony to insure that no one out of state criminal conviction could be a predicate felony unless that crime is a felony under the law of the State of New York.

JUSTIFICATION

Implementation of the current provisions deprive defendants of equal protection of the law. For example, convictions of vagrancy in Rhode Island, blasphemy in New Jersey, or the theft of a turkey in Arkansas, would mandate second felony offender status under the present statute for one later convicted of a New York felony. Such a result is purely arbitrary and without basis in reason. The Appellate Division, Third Department, recently held the statute unconstitutional (People v. Morton, 3/7/75).

FISCAL IMPLICATIONS

None.

EFFECTIVE DATE

Immediately.

State of New York
Court of Appeals

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

JOSEPH A. MERCOGLIANO

CERTIFICATE
DENYING
LEAVE

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied, with leave to review in view of the pendency of People v. Mary Ann Parker.

Dated at New York, New York

February 4, 19 76

Jacob D. Fuchsberg

Associate Judge

*Description of Order: Order of the Appellate Division, Second Department dated January 6, 1976 affirming judgment of the County Court, Nassau County rendered April 4, 1975.